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No. 94-792

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

HALLCO MANUFACTURING, CO., INC.
and OLOF A. HALLSTROM, *Petitioners*,

v.

RAYMOND KEITH FOSTER, KEITH MFG. CO.,
INC. and KEITH SALES CO., *Respondents*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents (collectively "Foster") object to the questions presented for review by Petitioners (collectively "Hallco") for the reason that the questions are not supported by the record. Foster believes that the questions should be as follows:

1. Whether a party requesting relief from judgment under Rule 60(b), based on alleged fraud or other misconduct of an adverse party, must prove the alleged fraud or other misconduct by clear and convincing evidence?

2. Whether, with respect to a jury verdict that a party "tried to willfully mislead the court and jury", based on an interrogatory that did not include a "clear and convincing" standard of proof, it is an abuse of discretion for a trial court to hold that "the court cannot conclude that the jury made this finding by clear and convincing evidence" and further hold that the party alleging fraud has not shown by "clear and convincing" evidence that the adverse party had "willfully attempted to mislead the court and the jury"?

3. Whether a party whose patent is found to be invalid for failure to disclose the "best mode" can seek a new trial under Rule 60(b), limited to the "best mode" issue, based on alleged fraud or misconduct of the adverse party with respect to a trial exhibit having no relationship to the "best mode" issue, without demonstrating that such party has a substantial "best mode" case to present?

LIST OF ALL PARTIES

All parties to the proceeding are identified in the caption. Pursuant to *Supreme Court Rule* 29.1, petitioners state there are no parent or subsidiary companies to be listed.

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I. STATEMENT OF THE CASE

A. OVERVIEW

Hallco has in its Petition both misstated and understated the district court record. In Hallco's "Questions Presented," the statements "there is uncontroverted *prima facie* evidence that an adverse party willfully altered a key trial exhibit," "such misconduct affected the trial" and the "trial court [gave] no weight to a jury verdict that an adverse party willfully altered a key trial exhibit in an attempt to mislead the court and jury" are not supported by the record. In its Petition, Hallco makes no mention of the jury's finding that Foster proved "by clear and convincing evidence that the 1973 drive mechanism in the Wilkens 45-foot trailer move[d] the slats in a 1-2-3 motion." References herein to "A" are to the Joint Appendix of the present action on appeal before the Court of Appeals for the Federal Circuit.

B. OMITTED MATERIAL FACTS

Following a five-week trial held in October and November of 1992, a jury returned a verdict which included "yes" answers to Interrogatories Nos. 13 and 15 which read:

> Interrogatory No. 13: Did Foster prove by clear and convincing evidence that Hallstrom failed to disclose the best mode known to him when he filed the application which became the '760 patent, as to either claim 1 or claim 4 of the '760 patent? (A 1247)
>
> Interrogatory No. 15: Did Foster prove by clear and convincing evidence that the 1973 drive mechanism in

> the Wilkens 45-foot trailer moved the slats in a 1-2-3 motion, and included a one-way mechanical coupling, in the form of pull blocks on the push rods, for insuring simultaneous movement of all slats in the conveying direction? (A 1249)

and a "no" answer to Interrogatory No. 16 and a "yes" answer to Interrogatory No. 17 which read:

> Interrogatory No. 16: Do you find that Foster tried to mislead the court in his 1991 affidavit, Defendant's exhibit 671, with respect to the 1973 45-foot Wilkens drive unit? (A 1250)

> Interrogatory No. 17: Do you find that Foster tried to willfully mislead the court and jury with respect to the drive unit, identified as plaintiff's exhibit 162, the drive unit which Foster contends represents the 1973 45-foot Wilkens drive unit? (A 1251)

The "yes" answer to Interrogatory No. 17 is what promoted Hallco to file a motion for relief from judgment under Rule 60(b).

1. Best Mode. Foster's "Best Mode" evidence was for the most part the testimony of the patentee Olof A. Hallstrom ("Hallstrom"). With respect to the "drive means" disclosed in the '760 patent, Hallstrom testified:

> If I would consider this to be a machine drawing, a drawing for production as opposed to a schematic drawing, I would not do it this way, no. (A 1443)
>
> * * * * *
>
> The illustration of pin 30 there is simply a means of connecting. It's simply one of many means of

> connecting. In actual practice, I believe most of these are connected rigidly by one means or another. (A 1446)

Hallstrom testified that in actual practice the system included a "push rod" about which he stated:

> It is an extending arm which serves a dual purpose. It helps to resist rotational forces upon the transverse drive beam. It also provides for the placement [sic] of abutment[s]. (A 1447)

In further regard to the disclosed pivot pin connections, Hallstrom testified:

> In actual practice a pivot pin was not used there. (A 1449)
>
> [T]here was no point in it being pivotal. In fact, it would be ***detrimental***. Therefore, the connection was more of a rigid nature. (A 1449)
>
> [I]t's ***desirable*** to reduce the tendency of the crossdrive to roll . . . by having some of the rolling effect taken up through a push rod and not being supported only by the deck. (A 1450)

The '760 patent includes the statements:

> Another important object of this invention is to provide a reciprocating conveyor of the class described in which the fluid pressure drive system is formed of commercially available components and therefore is of minimum cost. (A 657)

* * * * *

> Moreover, the conveyor includes a fluid pressure drive system composed of commercially available components. The cost of manufacture, maintenance and repair thus is reduced to a minimum. (A 660)

At trial, Hallstrom testified that the hydraulic cylinders with check valves built into them, disclosed only schematically in the '760 patent, were ***not*** commercially available. (A 1457-58) He further testified that it took him a substantial time to develop a suitable check valve. (A 1458)

Prior to the filing of the '760 application, Hallstrom started using a hydraulic switching valve known as the Dupar Dynamics "Walton" or "Rothrock" valve. (A 623-27, 670, 1636-43) This switching valve was not disclosed in the '760 patent, but instead an air system valve was disclosed. With respect to the air system valve, Hallstrom testified:

> It worked up to the point that the operators would keep their air systems to the trailer working properly. But if there was not air pressure available then ***the system left a little to be desired.*** (A 1454)
>
> * * * * *
>
> There is also [a] question in my mind of the possibility of an air leak developing in the system which could take the air away from the air brakes of the vehicle and ***I got concerned*** over the possibility of liability in the event that brakes should fail. (A 1455)

Hallstrom was asked and he answered:

> Q And so what did you do in response to that concern?
>
> A We made this valving totally hydraulic so it operated off of the oil hydraulic system.

Q Now, that's a reference to the use of the Dupar Dynamics valve which has also been referred to as the Walton valve or the Rothrock valve?

A Yes (A 1455-56)

Hallstrom further stated:

> The Rothrock valve was an internally hydraulical[ly] activated valve which caused it to operate a little like a wall switch that, [being] it's one way or the other way; and ***it's a very desirable type of valve for our application.*** (A 670)

Lee H. Jones, a Hallco dealer, testified that the air control valves never worked and had to be replaced by the "hydraulic switching valve", i.e. "a mechanical switching device that's all done in oil." (A 1259-63, 1433-36) Mr. Jones referred to the hydraulic switching valve as "one great improvement." (A 1437)

In December of 1974, prior to the filing of the '760 application in January of 1975, Hallstrom wrote a letter to a prospective customer in which he stated:

> We have now completed the major part of our R and D and will soon be ready to market our product.
>
> There are presently twenty (20) units working in a wide variety of materials under all types of weather conditions. From this experience ***we have developed a closed hydraulic system free of external controls*** (electric, etc.). (A 1674)

Based on this evidence, the jury found that Hallstrom had not disclosed the "best mode". (A 476) Hallstrom did not appeal the district court's holding that claims 1 and 4 were invalid for failure to disclose the best mode. There is no connection between the "best mode" issue and PX 162, the drive unit referred to in Interrogatory No. 17.

2. The Wilkens 1973 Trailer. At trial, four people testified that in 1973 the drive mechanism in the Wilkens 45-foot trailer moved the slats in a 1-2-3 motion and included a one-way mechanical coupling in the form of pull blocks on the push rods for insuring simultaneously movements of all slats in the conveying direction. These people were respondent Raymond Keith Foster ("Keith"), Art Wilkens, Chuck Wilkens and Darryl Oakley.

Keith and Art Wilkens testified that prior to acquiring the 45-foot trailer, Art Wilkens had purchased from Keith a truck which included an "inch" system conveyor. (A 1503, 1310-11) Based on his experience with the "inch" conveyor, Art Wilkens requested that the trailer be furnished with a longer stroke conveyor. (A 1312-13) Keith passed this request on to Hallstrom who then delivered the 1-2-3 drive unit (PX 162) to Keith. (A 1502-03) Keith installed the drive unit in the trailer. Darryl Oakley, a South Dakota trucker, testified that he was hired by Art Wilkens to pick up the trailer and deliver it to Art Wilkens in Kansas. (A 1313) Darryl Oakley first took the trailer to his home in South Dakota and used it thirty-seven times before delivering it to Art Wilkens. (A 1398) During cross-examination Hallco's attorney suggested to Darryl Oakley that the conveyor was an "inch" system conveyor. (A 1412-13) Darryl Oakley answered that he knew nothing about the "inch" system conveyor; he was only familiar with the 1-2-3 motion conveyor. (A 1413) Art Wilkens and his son Chuck Wilkens testified that they both

used the trailer. (A 1316, 1370) After a while, they experienced trouble caused by electrical control components getting dirty. (A 1316) At times they had to manually operate the control system. (A 1317-18, 1371-72) They did this by detaching wires and tapping them on the trailer frame to make the system operate. (A 1316-18, 1371-72) At trial, Art Wilkens demonstrated this procedure with PX 162. (A 1333-35)

Keith testified that because of the problems experienced by Art and Chuck Wilkens with the electrical control system, he sought to develop a mechanical/hydraulic control system that would duplicate the 1-2-3 motion. (A 1540-42) In the latter part of 1973, Keith had Dupar Dynamics design for him two mechanical/hydraulic systems for powering a reciprocating slat conveyor, one in a 1-2-3 and the other in a 1-2-3-4 motion. (A 561, 572, 1540-42) In early 1974, Keith obtained a 1-2-3-4 system design from Paul Monroe, a hydraulic design shop located in California. (A 1542) In March of 1974, Keith bought a 1-2-3-4 control system from Dupar Dynamics and installed it in a trailer which he had built for the Three-Way Cattle Company. (A 382, 564-69, 1540-41) This system did not work properly. (A 1541) In April of 1974, Foster made and installed a working drive system that is presently in the Three-Way Cattle Company trailer. (A 1541-52) At trial, Don Tonnagel and Richard Lawson of Dupar Dynamics testified about their helping Keith develop a mechanical/hydraulic control for 1-2-3 and 1-2-3-4 conveyors, starting in late 1973. (A 1290-1300, 1300-04) Their testimony was supported by drawings of these systems and purchase records of hydraulic components by Keith from Dupar Dynamics. (A 559-72) A drawing of the Paul Monroe 1-2-3-4 system design was also introduced at trial. (A 573)

Regarding PX 162, during trial Keith was asked and he answered:

Q Mr. Foster, with respect to this Exhibit 162 that you've been looking at. Did you make any changes in substance to the mechanism that causes the one, two, three operation to occur?

A No.

Q The changes were making cylinders unstick or warped cylinders work and that sort of thing?

A Stuck valves to become unstuck and limit switches had to make contact where they were corroded.

Q You made reference to a Model T. If you were to in 1992 find an old Model T that had been sitting around, would you have to do some cleaning up and things with it to get it to work so you could show someone how it works?

A Yes, we would. In fact I did that many years ago.

Q That's in effect what you did with this drive in front of us?

A That's right. (A 1601-02)

Based on this evidence, the jury answered "yes" to Interrogatory No. 15., i.e. found that Foster had proved by clear and convincing evidence that the 1973 drive mechanism in the Wilkens 45-foot trailer moved the slats in a 1-2-3 motion, etc. (A 1249, 523)

3. Keith's 1991 Affidavit. In August of 1991, Foster filed a motion for summary judgment in which he contended *inter alia* that, "If claims 1 and 4 are construed broadly enough to embrace the RF II conveyor, they would also embrace the Wilkens '73 trailer and thus be invalid." This motion was supported by an affidavit from Keith in which he described the 1-2-3 mode of operation of the conveyor in the Wilkens trailer and made reference to photographs and drawings of PX 162. (A 1675-93) Keith's affidavit was corroborated by affidavits from Art Wilkens, Chuck Wilkens and Darryl Oakley. (A 1694-1702, 1714-16) The district court found that there were questions of material fact and for this reason denied the motion.

With respect to Keith's affidavit, at trial Hallco's attorney questioned Keith and he answered:

> Q Okay. So when you say Exhibit L, M, N, O, P are photographs of the 1973 drive mechanism for the conveyor in the Wilkens '73 trailer, you were referring to this drive mechanism, correct?
>
> A That's what I - - we thought so when we wrote this up.
>
> Q Okay. And you didn't say anything in this [affidavit] and you didn't say anything until yesterday about the fact that this was more or less an assemblage of parts from other prior units?
>
> A At one point, we started here with - - we had five model T's out in the back. We had to make some of them run. And so the parts - - or some of them were wrong on one and some wrong on another. I thought

we did a marvelous job of getting two of them to run.

Q You did a marvelous job of getting one of them to run in the one, two, three motion, but you never told the Court and you never told anyone until yesterday that this wasn't the same unit, did you?

A It's basically the same unit. Now, I told you there was a mistake made by some of our men that they lost some of the parts. At one time we took them and cleaned. I told them to clean them up and steam clean them, and some of the parts were lost. (A 1599-1600)

During redirect Keith was asked and he answered:

Q Now, the substance of your affidavit that you made, the affidavit you've been questioned about, is that in substance correct?

A The substance is correct. I'm not sure everything about it is perfect, but in substance it's correct. (A 1602)

Based on the testimony of Keith and the corroborating testimony of Art Wilkens, Chuck Wilkens, Darryl Oakley, Don Tonnagel and Richard Lawson, and the corroborating exhibits, the jury answered "no" to Interrogatory No. 16, i.e., found that Foster did not try to mislead the court in his 1991 affidavit with respect to the 1973 45-foot Wilkens drive unit. (A 1250, 523)

4. PX 162. Foster sought and obtained the court's permission to demonstrate PX 162 and some other prior art

devices to the court and jury. The demonstrations were held in a rented building that was several blocks from the courthouse. The time allotted for the demonstrations was limited. Therefore, Foster first presented the testimony of Art Wilkens who testified with respect to PX 162 and another exhibit and demonstrated PX 162. (A 1324-35) Art Wilkens also demonstrated how back in 1973 he detached a pair of control wires and tapped them on the trailer frame to make the drive unit work. (A 1333-34) Near the end of the day, the district court judge requested that the parties finish taking testimony in the courtroom. (A 1357-59) In response, Hallco's attorney asked the court for permission to ask Keith some questions regarding PX 162 and another exhibit before returning to the courtroom. (A 1358-59) The district court granted his request. (A 1358) Thus, Keith was in effect cross-examined with respect to PX 162 before he presented direct testimony regarding these exhibits. It was during this examination that Keith first testified that PX 162 had to be restored in order to make it work. (A 1360-65) Later during examination by his own attorney, Keith was asked and he answered:

> Q Yesterday you had some cross-examination in effect on this before you had any direct questioning - - .
>
> A Okay.
>
> Q --about it. And it's correct that it's your testimony that this unit or [a] unit basically similar, something that had the working parts but maybe different cylinder parts, was in that 1973 Wilkens trailer when it was picked up by Mr. Oakley?
>
> A Yes, sir. (A 1513)

During questioning by Hallco's attorney, Keith testified that in order to make PX 162 work his workmen had to take the drive unit apart and clean it and had to replace some of the electrical components and a warped cylinder. (A 1360-65, 1601-02) The replacement cylinder was identical to the original cylinder and it came from an old "inch" system drive unit. (A 1506-09) Keith also testified that one of his workmen reassembled PX 162 with angle iron base members from one of the other drive units and the original base members were lost. (A 1361-62) These base members were identical to the original base members except for the placement of some mounting holes. As previously stated, Keith was asked by Foster's attorney and he answered:

> Q Mr. Foster, with respect to this Exhibit 162 that you've been looking at. Did you make any changes in substance to the mechanism that causes the one, two, three operation to occur?
>
> A No. (A 1601)

It has always been Keith's position that when he obtained PX 162 from Hallstrom back in 1973, it came with the 1-2-3 mode of operation. If PX 162 was changed from an "inch" motion to a 1-2-3 motion, it was done by Hallstrom back in 1973.

As its last witness on the last day for taking testimony, Hallco presented Hallstrom to testify with respect to PX 162. (A 1083-1101) Hallstrom pointed out to the jury that a cam plate had been removed from a control bar in PX 162 and there was "shiny" metal where the cam plate had once been attached. Hallstrom also made reference to a "milled out" region in a guide member in PX 162. (A 1092-93) Hallstrom suggested that this member belonged on DX 673, an "inch"

system drive unit and that a like member on DX 673 which did not include a "milled out" portion belonged on PX 162. (A 1091-92) Hallstrom did not say that he had actual knowledge that Keith or someone else associated with Foster had removed the cam from the control rod.

With respect to the main issue regarding PX 162, viz. what was its mode of operation in 1973, the jury did not believe Hallstrom; it instead believed Keith. (A 1249, 523) The jury found that Foster had by "clear and convincing evidence established that the 1973 drive mechanism in the Wilkens 45-foot trailer moved the slats in a 1-2-3 motion" (Interrogatory No. 15). (A 1249, 523) The jury believed Keith's 1991 affidavit testimony that the slats in the Wilkens trailer had a 1-2-3 motion in 1973 (Interrogatory No. 16). (A 1250, 523)

5. Foster's Trial Strategy. Foster's trial strategy was to inform Hallco early as to the witnesses and exhibits Foster would be using at trial with respect to all of the issues. This was done in order to determine which issues would be in dispute well before trial. Foster first put Hallco on notice that Foster was going to be relying on PX 162 and the testimony of Keith, Art Wilkens, Chuck Wilkens and Darryl Oakley, back in August of 1991, when Foster filed its motion for summary judgment. (A 27, items 271-73) In the Pretrial Order, Foster defended Hallco's charge of infringement by contending *inter alia*:

> (3) Claim 1 is invalid, if construed broadly enough to cover the RF II conveyor because it would then also embrace the prior art Marion conveyor that was demonstrated in the January 1974 show, the prior art 45-foot conveyor sold to Wilkens in 1973, the prior art conveyor that was delivered by FOSTER to the Three-

Way Cattle Co. in April of 1974, and the prior art conveyor that was delivered by FOSTER to Howard Hay Co. in April of 1974.

* * * * *

(6) Claim 4, if construed broadly enough to cover the RF II conveyor, would be invalid because it would then also embrace the prior art 45-foot conveyor sold to Wilkens in 1973, the prior art Three-Way Cattle Co. conveyor that was delivered by FOSTER to the Three-Way Cattle Co. in April of 1974, and the prior art conveyor that was delivered by FOSTER to Howard Hay Co. in May of 1974.

(7) Claims 1 and 4 are invalid, if construed broadly enough to cover the original conveyor sold to IMCO and leased to Oakley in July of 1974, the prior art 45-foot conveyor sold to Wilkens in 1973, and/or the replacement conveyor that was built in 1974 and furnished to Oakley in November or December of 1974, because HALLSTROM would have failed to disclose the best mode know to him at the time he filed the patent application in January of 1975. (A 42, item 422)

6. Hallco's Trial Strategy. In the Pretrial Order, Hallco's sole contentions regarding validity of the '760 patent were:

(2) The '760 patent is presumed valid, so Hallco needs to make no showing as to validity or enforceability. However, Foster is barred by the 1982 settlement from asserting invalidity or unenforceability.

(3) In the event Foster asserts invalidity of the '760 patent, Hallstrom's conception of the invention preceded alleged prior art Foster is contending invalidates the '760 patent. (A 42, item 422)

In June of 1992, Hallstrom and Hallco's attorney went to Foster's plant in Madras, Oregon and witnessed a demonstration of PX 162 and two other drive units. (A 1619) However, between August of 1991 and the start of trial Hallco did not depose Keith, Art Wilkens, Chuck Wilkens or Darryl Oakley, or take any other discovery with respect to PX 162 or the Wilkens trailer.

During the last week of trial, Hallco's attorney initiated several discussions with the court with respect to the division of the remaining testimony time between the parties. His main concern was that he have the last two hours of time on the last day of taking testimony in which to present final rebuttal testimony. (A 1531) He did not at any time inform the court that he needed additional time and he did not ask for a continuance. To the contrary, he told the court, "I think we're moving along real well now." (A 1488) On the last day of trial he stated to Foster's attorney, "Why don't you have an extra half hour this afternoon . . . as long as I have after 2 o'clock." (A 1531)

As previously stated, during the last two hours on the last day for taking testimony, Hallco presented Hallstrom as a witness with respect to PX 162. (A 1083-1101) During his testimony Hallstrom made allegations that someone had altered PX 162. Hallco's attorney has since contended that the alterations were the product of fraud or misconduct by Keith.

On that last day of taking testimony, Hallstrom testified that in June of 1992 he saw the "shiny" metal when he was at Foster's plant viewing operation of PX 162. (A 1619-20) During trial, he was asked and he answered:

Q You never pointed it out at that time?

A I would have, but Pete shut me up. (A 1619-20)

"Pete" is Peter E. Heuser, Hallco's attorney. In a trial memorandum, Hallco stated that it did not make PX 162 an issue in the Pretrial Order because Hallco assumed all along that Foster had a reasonable explanation for the "shiny" metal. (A 1850)

Hallco did not present Interrogatories Nos. 16 and 17 to the court until after the completion of testimony. (A 46, item 481)

C. MISSTATEMENTS

Key misstatements made in the Petition are:

1. There is uncontroverted *prima facie* evidence showing "fraud" in the form of a willful alteration of PX 162 to change its mode of operation,

2. Foster has not presented any explanation as to removal of the cam plate, the presence of "shiny" metal, the presence of a milled out portion in a guide member in PX 162, and Sam Windsor's testimony that shortly before trial he inspected "another drive unit" which operated in the 1-2-3 mode,

3. Hallco presented uncontroverted *prima facie* evidence that misconduct by Foster affected Hallco's presentation of its case,

4. The trial court gave no weight to the jury's "yes" answer to Interrogatory No. 17, and

5. The trial court failed to address the affect of Foster's conduct on "the integrity of the judicial process."

In response:

1. No *Prima Facie* Showing. At trial, Hallstrom contended that Keith had altered PX 162 shortly before trial, to change its mode of operation, and in the process removed a cam plate, leaving "shiny" metal where the cam plate had been attached. Keith countered by stating that when he received PX 162 from Hallstrom in 1973 it had a 1-2-3 mode of operation. Keith's testimony was corroborated by Art Wilkens, Chuck Wilkens and Darryl Oakley, each of whom had first hand knowledge of how PX 162 operated in 1973. It is Foster's position that if PX 162 is a modified "inch" system drive unit, the modifications were made by Hallstrom back in 1973, before the drive unit was delivered to Foster.

2. The Cam Plate. Foster agrees that a cam plate was removed from a control bar in PX 162. However, Keith testified that he did not remove the cam plate. It is Keith's position that the cam plate was removed back in 1973 before the drive unit was delivered to Keith.

3. The "Shiny" Metal. It is undisputed, PX 162 was restored and operated in August of 1991 and at that time Foster took pictures of PX 162 in operation that became exhibits in Foster's Motion for Summary Judgment. It is also undisputed, PX 162 was demonstrated to Hallstrom and his attorney in June of 1992. There is testimony by Foster that PX 162 had been stored outside at times between August of 1991 and shortly before trial. There was no testimony by anyone as to how the region of the control bar where a cam plate had once been attached became "shiny" on the last day of trial, only accusations by each side. However, Foster testified that PX 162 was steam cleaned shortly before trial.

This could be why the region in question was "shiny" on the last day of trial.

4. The "Milled Out" Portion. During his trial testimony and since, Hallstrom has suggested that the member which included the "milled out" portion had been interchanged with a like member in DX 673. On page 5 of its Petition, Hallco implies that the corresponding member in DX 673 includes a "milled out" portion. This is not true. The corresponding member in DX 673 does not include a "milled out" portion.

5. Sam Windsor's Testimony. Sam Windsor testified that before trial he inspected a drive unit that operated in the 1-2-3 mode, the same as PX 162. Sam Windsor did not say that the drive unit which he examined was a different drive unit. PX 162 was the drive unit that was inspected by Sam Windsor before trail.

6. Alleged Misconduct. There is evidence that Foster cleaned and restored PX 162 before demonstrating it at trial. There is evidence that Foster first demonstrated PX 162 and then presented testimony by Keith as to what restoration had to be done in order to make PX 162 workable. Based on all of the evidence, the trial court ruled that Hallco had not established misconduct by clear and convincing evidence.

7. Interrogatory No. 17. It is incorrect to say that the trial court gave no weight to the jury's "yes" answer to Interrogatory No. 17. The trial court considered the "yes" answer to Interrogatory No. 17 in light of the jury's "yes" answer to Interrogatory No. 15, the jury's "no" answer to Interrogatory No. 16, and the court's own evaluation of the evidence presented and the witness demeanor displayed during the trial.

8. Integrity Of The Judicial Process. The district court took Hallco's motion for relief for what it was; a desperation attempt by a losing party to reverse its loss. The trial court's ruling was a demonstration of "the integrity of

the judicial process." The district court thwarted an unwarranted attack on a "honestly procured judgment."

II. SUMMARY OF ARGUMENT

This is not an appropriate case for review on *certiorari*. There are no issues or conflicts of federal law requiring clarification or decision by this Court, and underlying factual issues were resolved against Petitioner.

A party requesting relief from judgment under Rule 60(b), based on alleged fraud or other misconduct of an adverse party, must prove the alleged fraud or other misconduct by clear and convincing evidence. Hallco is not contending that the burden of proof is less than "clear and convincing" or that there is a conflict amongst the circuits as to the burden of proof.

With respect to the jury verdict that Foster "tried to willfully mislead the court and jury", it was not an abuse of discretion for the trial court to hold that "the court cannot conclude that the jury made this finding by clear and convincing evidence." It was also not an abuse of discretion for the trial court to decide the question and rule that Hallco had not shown by "clear and convincing" evidence that Foster had "willfully attempted to mislead the court and jury." The trial court itself viewed the demonstration of PX 162 and witnessed the demeanor of all the witnesses.

It was not an abuse of discretion for the district court to rule that "the trial tactics and strategy of Foster did not deny Hallco an opportunity to fully and fairly present its case or defenses." The trial court was aware of Hallco's failure to take discovery as to PX 162 and was aware of Hallco's trial

conduct including its failure to ask for more time or request a continuance.

In making its rulings, the trial court did not ignore, but in fact considered, the jury's "yes" answer to Interrogatory No. 17. The trial court also considered Hallco's answers to Interrogatories Nos. 15 an 16 and took a view of the case which made the special interrogatories consistent.

Furthermore, Hallco is not entitled to relief from judgment with respect to the "best mode issue because Hallstrom has not attempted to show, and cannot show, the it has a substantial case to present with respect to the "best mode issue."

III. ARGUMENT

A. THERE ARE NO LEGAL ISSUES NEEDING RESOLUTION

As discussed above, the questions presented by Hallco are based on premises that are not supported by the record. The question of possible misconduct by Foster, and its affect on the trial, were hotly contested issues. After considering all of the evidence and argument presented by the parties, including the demonstration of and testimony respecting PX 162, and its observing the demeanor of the witnesses as they testified, the trial court ruled in favor of Foster as to Interrogatory 17. In the process, the trial court considered and gave proper weight to the jury's "yes" answer to Interrogatory No. 17.

The district court ruled, and the parties agreed, the controlling law respecting Hallco's motion for relief under Rule 60(b) is the law of the United States Court of Appeals

for the Ninth Circuit. Amstar Corp. v. Envirotech Corp., 823 F.2d 1538, 1550 (Fed. Cir. 1987). To receive relief under Rule 60(b), "the moving party must establish that a judgment was obtained by fraud, misrepresentation, or misconduct, and that the conduct complained of prevented the moving party from fully and fairly presenting the case." In re M/V Peacock, 809 F.2d 1403, 1404-5 (9th Cir. 1987). Hallco has made no attempt to show that there is a conflict among the circuits with respect to this two-prong test.

B. FRAUD OR OTHER MISCONDUCT MUST BE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE

In its decision denying Hallco's motion for a new trial and relief from judgment, the district court ruled:

> Hallco must first establish the fraudulent act by clear and convincing evidence. Jones v. Aero/Chem. Corp., 921 F.2d 875, 878-79 (9th Cir. 1990). In Jones, the Ninth Circuit Court ruled that "under Rule 60(b)(3), the movant must, (1) prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct", *citing* Bunch v. United States, 680 F.2d 1271, 1283 (9th Cir. 1982) which made the same holding.

Oregon law is the same. In Riley Hill General Contractor, Inc. v. Tandy Corp., 303 Or. 390, 392, 737 P.2d 595, 597 (1987), the Oregon Supreme Court stated:

> [w]e hold that the burden of persuasion for common law deceit requires the proponent to prove each of the elements of deceit by clear and convincing evidence.

In its decision, the Oregon court discussed the origins and meanings of "preponderance" and "clear and convincing" evidence and it made reference to a statement by then Chief Justice Warren Burger, in Addington v. Texas, 441 U.S. 418, 424 (1979), that one typical use of the "clear and convincing" standard is in "civil cases involving allegations of fraud or some other quasi-criminal wrongdoing."

Hallco has made no attempt to show that there is a conflict among the circuits regarding the burden of proof issue or that the burden of proof should be something other than "clear and convincing".

C. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO RULE THAT IT COULD NOT CONCLUDE THAT THE JURY HAD FOUND THAT FOSTER "TRIED TO WILLFULLY MISLEAD THE COURT AND JURY" BY "CLEAR AND CONVINCING" EVIDENCE

Hallco wrote Interrogatory No. 17 and is solely responsible for it not including the "clear and convincing" standard of proof. It was proper and not unreasonable for the district court to rule that it could not say that the jury applied the correct standard of proof. Whatever prompted the jury to answer "yes" to Interrogatory No. 17, it did not make the jury disbelieve either Foster's 1991 affidavit testimony or the evidence presented at trial which prompted the jury to answer "no" to Interrogatory No. 16 and "yes" to Interrogatory No. 15. The court correctly recognized that the jury's "clear and convincing" finding, in its answer to Interrogatory No. 15, constitutes a finding by the jury that the "tried to willfully mislead" conduct, whatever it was, was not material to the main fact question that the jury was asked to answer.

The Ninth Circuit requires trial and appellate courts to seek reconciliation of apparently inconsistent verdicts:

> "When faced with a claim that verdicts are inconsistent, the court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, and must exhaust this effort before it is free to disregard the jury's verdict and remand the case for a new trial." Toner v. Lederle Laboratories, 828 F.2d 510, 512 (9th Cir. 1987), *cert. denied*, 485 U.S. 942 (1988), *citing* Gallick v. Baltimore & Ohio R.R., 372 U.S. 108, 119 (1963), *also see* Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1228 (Fed. Cir. 1989).

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment." Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962).

> "But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.'" Gallick v. Baltimore & Ohio R.R., 372 U.S. at 119, *citing* Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. at 364.

Quite clearly, the district court followed the mandate of these courts and took a view of the case which made the jury's findings consistent.

D. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO RULE THAT HALLCO HAD NOT SHOWN BY "CLEAR AND CONVINCING" EVIDENCE THAT FOSTER HAD "WILLFULLY ATTEMPTED TO MISLEAD THE COURT AND JURY"

Faced with Interrogatory No. 17, and its omission of the "clear and convincing" standard, and the vagueness of "tried to willfully mislead", the district court did the reasonable thing. That was to independently decide the question presented by Interrogatory No. 17, using the correct standard of proof. The jury was not furnished with any instructions as to the meaning of "willfully", "attempt" or "mislead" in relationship to "fraud" or "misconduct." Each juror was left to his or her own frame of reference as to what he or she thought amounted to "tried to willfully mislead." On the other hand, the district court judge had an understanding of what amounts to legal misconduct. She was present throughout the trial, she viewed the demonstration of PX 162, including the "shiny" metal on PX 162, and viewed DX 673 and witnessed the demeanor of Keith, Art Wilkens, Chuck Wilkens, Darryl Oakley, Don Tonnagel , Richard Lawson and Hallstrom as they testified. Under all of the circumstances, it was entirely reasonable for the trial court to rule that Hallco had not shown by clear and convincing evidence that Foster had intended to mislead the court and jury.

As stated by the Ninth Circuit in Atchinson v. Barrett, 246 F.2d 846 (9th Cir. 1957), a motion for relief of judgment or for a new trial, based on an allegation of misconduct, "is directed to the sound discretion of the trial court, and particularly to the discretion of the trial judge who presided in the litigation in which the judgment (now alleged as

fraudulent) was entered." Atchinson v. Barrett, 246 F.2d at 849 (citations omitted). The Atchinson court further stated:

> The trial judge saw and heard the plaintiff; saw his twitchings, what they were and what they were not, as did the jury. He saw or heard the other matters relied on by appellant; he felt the "climate" of the trial. The trial judge found no fraud nor misrepresentation. The Court of Appeals should not and will not substitute its judgment for that of the trial court, nor reverse the lower court's determination save for an abuse of discretion. Atchinson v. Barrett, 246 F.2d at 849.

Hallco has not attempted to show that there is a conflict amongst the circuits regarding this "sound discretion of the trial court" rule.

E. IT WAS NOT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO RULE THAT "THE TRIAL TACTICS AND STRATEGY OF FOSTER DID NOT DENY HALLCO AN OPPORTUNITY TO FULLY AND FAIRLY PRESENT ITS CASE OR DEFENSES"

The trial court was aware that Hallco had been informed as early as August of 1991 of Foster's position with respect to PX 162 and that testimony would be coming from Keith, Art Wilkens, Chuck Wilkens and Darryl Oakley with respect to how PX 162 operated back in 1973. The trial court was aware of the unused pretrial opportunities of Hallco (1) to conduct discovery with respect to PX 162, (2) to make the alleged alteration of PX 162 an issue in trial by, before trial, adding this issue to the Pretrial Order, or (3) to take steps to exclude PX 162 from the trial. Also, the trial judge was present throughout the trial and was aware that Hallco did not

at any time ask for additional time to present testimony and it did not at any time ask for a continuance. The trial court was aware that Hallco's attorney informed it that "I think we're moving along real well now", etc.

Under the Ninth Circuit rule set forth in M/V Peacock, supra, because the trial court had found that Foster's judgment was not obtained by fraud, misrepresentation or misconduct, it was not necessary for the court to find that Hallco had not been prevented from fully and fairly presenting its case. In any event, the court proceeded to decide this issue. The trial court's finding that "the trial tactics and strategy of Foster did not deny Hallco an opportunity to fully and fairly present its case or defenses" is a ruling that is subject to the "sound discretion of the trial court" rule set forth in Atkinson. Hallco has not attempted to show that there is a conflict amongst the circuits regarding this rule or that this rule should not be followed for some other reason.

F. IN MAKING ITS RULINGS, THE TRIAL COURT DID NOT IGNORE BUT RATHER GAVE PROPER WEIGHT TO THE JURY'S "YES" ANSWER TO INTERROGATORY NO. 17.

On page 11 of its Petition, Hallco states:

> The question left completely unanswered, even by those circuits which have established Rule 60(b)(3) guideposts, is whether the presentation of uncontroverted *prima facie* evidence demonstrating fraud or misconduct requires the granting of a Rule 60(b) motion, or whether a court can, in its discretion, completely ignore uncontroverted evidence offered to prove fraud.

Firstly, this case does not involve "uncontroverted *prima facie* evidence demonstrating fraud or misconduct. The evidence argued by Hallco was controverted by Foster. Interrogatory 17 was prepared by Hallco and was directed to "tried" conduct. The jury ***was not*** asked to find and ***did not*** find that Foster committed "fraud" or that Foster committed "perjury", or that Foster "doctored" PX 162, or that Foster "manufactured evidence", or that Foster "destroyed and/or concealed evidence." The jury ***found*** that Foster ***did not*** try to mislead the court in his 1991 affidavit which included pictures of PX 162 and described PX 162 as having a 1-2-3 motion when he obtained it from Hallstrom in 1973 and installed it in the Wilkens trailer. The jury ***found*** that Foster ***proved*** by "clear and convincing" evidence that the 1973 drive in the Wilkens trailer moved the slats in a 1-2-3 mode and included pull blocks on the push rods. Hallco first asked the district court, then the federal circuit court, and now asks this Court to completely ignore these findings by the jury. Faced with the jury's answers to Interrogatories Nos. 15, 16 and 17, the district court followed the rule in Toner and "search[ed] for a reasonable way to read the verdicts as expressing a coherent view of the case." Thus, it was necessary for the district court to exercise its sound discretion when it was forced to consider the jury's "yes" answer to the "tried" conduct of Interrogatory No. 17 in light of the jury's finding that Foster had by "clear and convincing" evidence established that in 1973 the Wilkens conveyor moved the slats in a 1-2-3 mode and included pull blocks on the push rods.

G. HALLCO HAS NOT SHOWN THAT IT HAS A "BEST MODE" CASE.

Foster vehemently denies Hallco's contention that Foster changed the mode of operation of PX 162 and the trial court

found for Foster on this issue. But, in any event, there is no connection between PX 162 and the reasons why the jury found that Hallstrom had not disclosed the best mode.

In Restatements, Second, Judgments §70, at page 183, it is stated:

> Finally, the party seeking relief must demonstrate, before being allowed to present his case, that he has a substantial case to present . . ..

In its Petition, Hallco has made no attempt to establish that it has a best mode case to present. In its Brief to the Federal Circuit, Hallco stated:

> [O]ther than Mr. Foster himself, the only live witness testifying in support Foster's best mode defense was Darryl Oakley, who testified as to both best mode (A1050-53) and mode of motion of the early Wilkens trailer. (A1048-49)

This is a clear misstatement of the record. Foster's "best mode" defense is based on the testimony of Hallstrom discussed above starting on page 2 of this brief.

IV. CONCLUSION

Hallco's Petition should be denied because the case presents no issue appropriate for the court's review, and because the lower courts' holdings are not in error.

Respectfully submitted,

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